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No. 94-828

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, CALIFORNIA MEDICAL FACILITY, JAMES GOMEZ, EDWARD YLST, CAROLINE LOPEZ,

Petitioners,

v.

ALI MOYO,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALI MOYO, *Plaintiff-Appellant,* v. JAMES GOMEZ, Director of California Department of Corrections; EDDIE YLST, Warden, at California Medical Facility, et al.; CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.; DOES 1 through 10, inclusive, *Defendants-Appellees.*	No. 92-16996 D.C. No. CV 91-01716-WBS AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
March 17, 1994 – San Francisco, California

Filed August 8, 1994
Amended November 14, 1994

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and Linda McLaughlin, District Judge.*

Opinion by Judge Reinhardt

*The Honorable Linda McLaughlin, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in dismissing a plaintiff's civil rights action alleging that he was fired by the California Department of Corrections for protesting against and refusing to cooperate with its alleged practice of denying showers to African-American inmates after work shifts.

Appellant Ali Moyo, an African-American corrections officer with appellee the California Department of Corrections, brought an action under Title VII of the Civil Rights Act of 1964. Moyo alleged that he was fired by the Department for protesting against and refusing to cooperate with its practice of allowing showers after work shifts to Caucasian inmates but not to African-American inmates working the same job shift, in violation of § 704(a) of Title VII. The district court dismissed Moyo's action for failure to state a claim. Moyo appealed.

[1] An administrative adjudication by the Equal Employment Opportunity Commission holds that inmates working directly for a prison pursuant to state law requiring prisoners to work at hard labor are not "employees" within § 701(f) of Title VII. However, the dismissal of Moyo's complaint had to be reversed for separate reasons that did not rest on the question of the employment status of the inmates.

[2] If Moyo can show that he was discharged for refusing to carry out or otherwise protesting the defendants' alleged policy of denying showers to African-

American inmates after work shifts, he has stated a retaliation claim based on an unlawful employment practice – i.e., the alleged practice of requiring Moyo, as a condition of *his* employment, to discriminate against African-American inmates. Under § 704(a), requiring an employee to discriminate is itself an unlawful employment practice.

[3] In addition, Moyo would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred was "reasonable." If Moyo reasonably believed that the inmates were protected by Title VII, then his opposition to their treatment would be statutorily protected activity.

[4] Moreover, Ninth Circuit precedent acknowledges that prison inmates can be "employees" in certain circumstances.

[5] Thus, it could not be said with certainty that the alleged employment discrimination did not violate § 704. The district court's dismissal of Moyo's retaliation claim was improper.

[6] The district court was instructed on remand to allow Moyo to amend his complaint to attempt to state a claim under § 703(a)(1) of Title VII. Moyo alleged that he was fired because he refused to carry out a policy of discrimination against African-American inmates by denying them showers. These allegations set forth a claim that the defendants subjected Moyo to an offensive work environment, one polluted by racial discrimination.

COUNSEL

Carlos M. Alcala, Sacramento, California, for the plaintiff-appellant.

Kenneth R. O'Brien, Victor J. James, II, Barbara L. Christiansen, Littler, Mendelson, Fastiff, Tichy & Mathiason. Sacramento, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

Ali Moyo, a black corrections officer with the California Department of Corrections, appeals the district court's dismissal of his action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Moyo's amended complaint alleges that he was fired by the California Department of Corrections for protesting against and refusing to cooperate with defendants' practice of allowing showers after work shifts to white inmates but not to black inmates working the same job shift, in violation of § 704(a) of Title VII.[1] The district

[1] Section 704(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship of other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any

court dismissed Moyo's action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Moyo timely appealed. In his appeal, he also contests the district court's refusal to allow him to amend his complaint to state a cause of action under § 703(a) of Title VII,[2] for discrimination against him with regard to terms and conditions of employment. We reverse and remand to the district court.

I.

Moyo's complaint may not be dismissed unless it appears certain that he can prove no set of facts in support of his claim which would entitle him to relief. *Baker v. McNeil Island Corrections Center*, 859 F.2d 124, 127 (9th Cir. 1988). Moyo's allegations of material fact must be taken as true and construed in the light most favorable to his claim. *Id.*

In order to make out a prima facie case of discrimination based on opposition to an unlawful employment practice under § 704(a), Moyo must show that (1) he engaged in a statutorily protected activity (i.e., that he protested or otherwise opposed unlawful employment

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manner in an investigation, proceeding, or hearing under this subchapter.

[2] Section 703(a) provides, in pertinent part:

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

discrimination directed against employees protected by Title VII); (2) subsequently, he was disciplined or lost his job; and (3) a causal link exists between the protected activity and the adverse action. *See EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983). It is not necessary, however, that the employment practice actually be unlawful; opposition clause protection will be accorded "whenever the opposition is based on a *'reasonable belief'* that the employer has engaged in an unlawful employment practice." *Id.* at 1013 (emphasis added) (citations and footnote omitted). *See also Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987). Opposition can, of course, consist of a refusal to carry out an order or policy. An erroneous belief that an employer engaged in an unlawful employment practice is *reasonable*, and thus actionable under § 704(a), if premised on a mistake made in good faith. A good-faith mistake may be one of fact or of law. *See Jurado*, 813 F.2d at 1411 (English-only order not a Title VII violation as a matter of law, but opposition based on a reasonable belief that the order was discriminatory is protected).

[1] The defendants point out that an administrative adjudication by the Equal Employment Opportunity Commission ("EEOC") holds that inmates working directly for a prison pursuant to state law requiring prisoners to work at hard labor are not "employees" within § 701(f) of Title VII. *See* EEOC Decision No. 86-7 (April 18, 1986) (inmate performing prison maintenance solely inside the prison not an employee protected under Title VII). *See also Hale v. Arizona*, 993 F.2d 1387, 1393-95 (9th Cir. 1993) (en banc) (inmates performing obligatory

prison labor not employees under Fair Labor Standards Act). Nevertheless, the district court's dismissal of Moyo's complaint must be reversed for at least two separate reasons that do not rest on the question of the employment status of the inmates.

[2] First, if Moyo can show that he was discharged for refusing to carry out or otherwise protesting the defendants' alleged policy of denying showers to black inmates after work shifts, he has stated a retaliation claim based on an unlawful employment practice – i.e., the alleged practice of requiring Moyo, as a condition of *his* employment, to discriminate against black inmates. Under the terms of § 704(a), requiring an employee to discriminate is itself an unlawful employment practice. If Moyo can demonstrate at trial that he was discharged for refusing to implement a policy that discriminates against blacks, he has stated a claim under that section and the question whether the inmates are "employees" under the Act becomes wholly irrelevant.

[3] Second, regardless of whether the inmates in this case actually qualified as employees, Moyo would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred was "reasonable". If Moyo reasonably believed that the inmates were protected by Title VII, then his opposition to their treatment would be a statutorily protected activity. The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard – one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a *reasonable*

mistake may be one of fact or law. We also note that it has been long established that Title VII, as remedial legislation, is construed broadly. *See Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir.), *cert. denied*, 429 U.S. 1090 (1977). This directive applies to the reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters.

[4] Moreover, even if determining the actual "employee" status of the inmates were relevant to deciding this case, we might be unable to say, based on the bare facts in the complaint, that the inmates here were not "employees" under Title VII. Ninth Circuit precedent acknowledges that prison inmates can be "employees" in certain circumstances. *See Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988). In *Baker*, we reversed a district court's dismissal of a prison inmate's Title VII claim that he was discriminatorily denied employment in a prison library because the state librarian refused to work with a black man. We noted that the position as a library aide, while not work release, paid a salary and included some training. Given these features, and other factors analyzed in the opinion, we held that it was "not beyond doubt that a claim could not be proved under Title VII." *Id.* at 128. The complaint on its face reveals *no* facts regarding the terms and conditions of the inmates' labor, and thus does not provide us with any basis for determining the Title VII employment status of the particular prisoners involved.

[5] In sum, we cannot say with certainty that the alleged employment discrimination did not violate § 704(a) of Title VII. Moyo would be able to state a retaliation claim if he could show that he was discharged

for refusing to discriminate against black inmates. Such a claim would be based on the unlawful employment practice inherent in requiring Moyo to discriminate against blacks as a term or condition of employment. Under this theory of liability, the question whether the inmates are "employees" under Title VII would be wholly irrelevant. In addition, we cannot say with certainty from the face of the complaint that, even if the inmates were not employees, Moyo could not have *reasonably believed* that a violation of Title VII occurred. Moyo could also make out a retaliation claim if he could show that he was discharged for acting on this reasonable belief. Accordingly, the district court's dismissal of Moyo's retaliation claim was improper. We reverse and remand for further proceedings consistent with our opinion.

II.

We also reverse the district court's denial of Moyo's motion for leave to amend his complaint. Before dismissing the action, the district court questioned counsel for both sides as to whether Moyo claimed that his firing was due to discrimination against him personally, or merely as a result of retaliation for his protest against the alleged discriminatory treatment of black inmates. Moyo's counsel answered that Moyo's only claim was for retaliation. He soon thought better of this statement, and in a letter dated that same day stated that "[a]fter further reflection I believe . . . [that] Mr. Moya [sic] was discriminated [sic] based on the terms and conditions of his employment when the Department of Correction's force [sic] a Black Correctional Officer, Mr Moya [sic] to discriminate against Black inmates." "I further feel the complaint can

be amended to include this cause of action," counsel added.

[6] It appears that the district court was misled by plaintiff's counsel at oral argument; however, counsel sought to remedy his mistake shortly thereafter. Moyo is not seeking to pursue a facially groundless claim of discrimination with respect to terms and conditions of employment. He alleges that he was fired because he refused to carry out a policy of discrimination against black inmates by denying them showers. These allegations set forth a claim that the defendants subjected Moyo to an offensive work environment, one polluted by racial discrimination. Moyo would then have stated a claim of racially-based harassment under § 703(a). *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("[T]he phrase 'terms, conditions or privileges of employment' in [§ 703(a)] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . "), *quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). Accordingly, in light of the facts alleged, the letter of Moyo's counsel sets forth a plausible *theory* for a § 703(a) claim, one that could conceivably be proved at trial. Under the circumstances we do not think our liberal amendment rules permit the forfeiture of the possible claim that Moyo may possess, without affording him an opportunity to amend his complaint so as to attempt to state that claim. Accordingly, we remand with instructions to the district court to allow Moyo to amend his complaint to attempt to state a claim under § 703(a)(1) of Title VII.

The district court's judgment is

REVERSED AND REMANDED.